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No. 90-1889

IN THE

Supreme Court of the United States

October Term, 1990

JOSEPH FLUENT, Individually and as a representative of the Class of Salamanca Lessees holding 99-year leases from Seneca Nation of Indians; JAMES V. MONGILLO, Individually and as a representative of the class of Salamanca lessees holding 50-year leases from the Seneca Nation of Indians and KEITH MCCLAIN, Individually and as a representative of the class of congressional village lessees holding 99-year leases from the Seneca Nation of Indians; ROBERT ADAMIC, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; MARILYN ADAMIC, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; SALAMANCA COALITION OF UNITED TAXPAYERS, INC., Individually and on behalf of its membership,

Petitioners,

vs.

SALAMANCA INDIAN LEASE AUTHORITY; DAVID FRANZ, Individually and as Attorney for the City of Salamanca Indian Lease Authority; ANTONIO CARBONE, Individually and as Mayor of the

Respondents.

(Additional Respondents continued inside Front Cover.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY TO RESPONDENT SENECA NATION'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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(Additional Respondents.)

City of Salamanca and also as member of the Salamanca Indian Lease Authority; CITY OF SALAMANCA; PATRICK CALLAGHAN, Individually and as Chairman of the Salamanca Indian Lease Authority; LINDA RYCHCIK, Individually and as member of the Salamanca Indian Lease Authority; HENRY STEFANSKI, Individually and as a member of the Salamanca Indian Lease Authority; OWEN K. PHILLIPS, Individually and as a member of the Salamanca Indian Lease Authority; DANN COLVIN, Individually and as a member of the Salamanca Indian Lease Authority; PAUL TAYLOR; PENNY BUCKLEY; SENECA NATION OF INDIANS,

Respondents.

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JURISDICTION

This Reply to the Brief in Opposition of Respondent Seneca Nation of Indians to Petition for Writ of Certiorari ("Seneca Nation Opp.") is submitted by Petitioners pursuant to Supreme Court Rule 15.6.

A. This Action Raises Questions That Are Fundamentally Important.

The Seneca Nation of Indians' ("Seneca Nation") statement that "The Case Presents No Issue Of General Importance" (Seneca Nation Opp. at 8) demonstrates the Nation's contempt for Petitioners' federally conferred and constitutionally protected property interests.

The decisions below establish precedent in the Second Circuit, which undoubtedly will be used by other Indian Nations throughout the country, that Indian Nations may disregard their freely assumed and federally approved obligations, without consequence. Those decisions hold that United State's citizens may be denied due process and stripped of protected property interests when legislation affecting those interests also affects Indians. The insidious precedent established is that Acts of Congress are unrestrained by the Constitution when legislation, in some fashion, concerns Indian affairs. Additionally, the courts below effectively held that the status (or race) of an individual determines whether that individual has access to the federal courts to vindicate federal rights and whether federal courts have the power to exercise judicial review. These questions are surely fundamental and important.

B. The Opinions Below Bar Petitioners From Obtaining Judicial Review Of The Statutes At Issue.

The Seneca Nation suggests that Petitioners could obtain judicial review of the Settlement Act of 1990, 25 U.S.C. §1774, ("Settlement Act of 1990") by suing a federal official. Seneca Nation Opp. at 11-12. Simultaneously, the Nation applauds the Second Circuit's conclusion that the Nation is an indispensable

party to any action challenging the constitutionality of the Settlement Act of 1990. *Id.* The Nation fails to explain how the addition of a federal official to the list of defendants below would have altered the application of Fed. R. Civ. P. 19 and the indispensable party doctrine. The Nation's status as an indispensable party would be unaffected by the presence of additional defendants.

Moreover, federal officials *were involved* in the proceedings below. As required by 28 U.S.C. §2403(a), the District Court certified the constitutional claims concerning the Settlement Act of 1990 to the U. S. Department of Justice and the U. S. Attorney for the Western District of New York. App. at 45a-46a. The United States decided not to intervene. App. at 73a.

The decisions below are unambiguous. Federal courts in the Second Circuit may not review or construe federal statutes which concern Indian affairs unless that review is sought by Indians. It is not surprising that the Seneca Nation cites no case to support of its novel assertion that Petitioners must sue federal officials to obtain judicial review of the Settlement Act of 1990. No such case exists.

C. *Dry Creek Lodge* Remains A Vital Decision With Force Which Creates An Intolerable Conflict Among The Circuits.

The Seneca Nation inaccurately asserts in its Opposition that the Tenth Circuit has not followed its holding in *Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes,* 623 F. 2d 682 (CA 10 1980) *cert. denied,* 449 U.S. 1118 (1981). Seneca Nation Opp. at 9. Although the Tenth Circuit has had numerous opportunities to overrule *Dry Creek Lodge* it has steadfastly affirmed that decision's exception to Indian sovereign immunity.

In *White v. Pueblo of San Juan*, 728 F. 2d 1307 (CA10 1984), the Tenth Circuit expressly reconciled its decision in *Dry Creek Lodge* with this Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). *White, supra*, 728 F.2d at 1309-1312. The court emphasized that *Dry Creek Lodge* was decided after *Santa Clara* and reiterated that the two were compatible.

The court recognized that the *Dry Creek Lodge* exception to Indian sovereign immunity, permitting suits against Indian tribes in federal court, was necessary in cases where non-Indian litigants otherwise had no remedy whatsoever. *Id.* at 1310, 1312.

Furthermore, the Tenth Circuit noted that *Dry Creek Lodge* was distinguished from *Santa Clara* because *Dry Creek Lodge* concerned matters outside of internal tribal affairs and it involved a dispute between non-Indians and the tribe. *Id.* at 1312. This Court has recognized that *Santa Clara* is distinguished by its intratribal character. *Nat. Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852 n. 14 (1985).

Like *Dry Creek Lodge*, the matter herein concerns non-Indians and a dispute outside of internal tribal affairs. The case at bar actually is much stronger than that presented in *Dry Creek Lodge*. Petitioners do not rely on the Indian Civil Rights Act ("ICRA") as the source of their claims nor as the basis for jurisdiction. Rather, Petitioners rely on specific Acts of Congress crafted exclusively to govern the lease relationship at issue.

Dry Creek Lodge remains a vital opinion with force. It has created tremendous confusion for litigants and lower courts. The conflict among the Circuits caused by *Dry Creek Lodge* is intolerable and should be resolved by this Court.

D. The Seneca Nation's Brief In Opposition Misrepresents The Effects Of The Settlement Act Of 1990.

The Seneca Nation maintained in the courts below, and now asserts by its opposition herein, that the Settlement Act of 1990 "ratifies" the Agreements entered into between the Seneca Nation and the City of Salamanca. Seneca Nation Opp. at 8 ("Moreover, the special problems involved in Seneca leasing have recently been addressed and resolved by Congress, which ratified the agreement providing new leases.") Nowhere does the Settlement Act of 1990 say that. Apparently, the Nation wishes to burden Congress, and thus the United States, with responsibility for the terms and conditions of the Agreements and 40/40 Leases.

It is manifestly clear that Congress wished to *extricate* itself from responsibility and liability for the terms and conditions of new leases between the Seneca Nation and lessees. Congress *expressly prohibited* the United States and New York State from negotiating, reviewing or endorsing the particulars of new leases between the Nation and lessees. The Act clearly stated that the Nation and lessees each were to represent their own interests in negotiations for new leases. Settlement Act of 1990 at §5. App. at 134a-135a. There have been *no* negotiations between the Petitioners and the Seneca Nation since enactment of the Settlement Act of 1990.[1]

[1] Not only do the decisions below bar Petitioners from obtaining judicial review of the Settlement Act of 1990, they presumably would also bar any action by Petitioners to *enforce* that Act. Since the Court of Appeals held that the Seneca Nation is a necessary party to litigation arising under the 1990 Act, Petitioners' action to enforce the Act's requirement that the Nation negotiate with Petitioners would be barred by sovereign immunity. No less than three times

(Footnote continued on following page.)

No government in this country enjoys the breadth of immunity which the Seneca Nation, with the lower courts' collaboration, has arrogated to itself herein.

The decisions below distort the doctrine of Indian sovereign immunity and transform it from a defensive shield into a formidable offensive weapon capable of severing Petitioners from the protection of the U. S. Constitution. This court recently refused to permit such offensive use of Indian sovereign immunity. *Blatchford v. Native Village of Noatak*, _____ U. S. _____, 111 S. Ct. 2578 (1991).

The will of Congress in the Acts of 1875 (18 Stat. 330), 1890 (26 Stat. 558), and the Settlement Act of 1990 is ignored by the decisions below. "The more appropriate presumption in this case is that Congress intended to honor legitimate expectations in the ownership [or possession] of real property and not to disturb them." *County of Oneida, N.Y. v. Oneida Indian, Etc.*, 470 U.S. 226, 273 (1985) (Stevens, *J.*, dissenting).

(Footnote continued from preceding page.)
since enactment of the Settlement Act of 1990, Petitioners have demanded negotiations with the Seneca Nation. App. at 553a, 566a, 572a. The Nation responded by threatening Petitioners that they would receive *no lease at all* if they persisted in their demands. App. at 560a, 574a. The Nation's opposition blatantly acknowledges the validity of Petitioner's argument that the dispute resolution process outlined in the Agreements and the 40/40 Lease, which contemplates litigation in the District Court, is wholly unenforceable against the Seneca Nation. Petition For A Writ of Certiorari ("Cert. Pet.") at 10 n.8.

E. At A Minimum This Court Should Vacate The Decisions Below And Remand To The District Court For Consideration Of Relevant Legislative History.

Throughout the proceedings in the lower courts the Seneca Nation steadfastly argued that the legislative history of the Acts of 1875 and 1890 was irrelevant.[2] Now, in its Opposition, the Seneca Nation acknowledges that legislative history is sufficient to waive Indian sovereign immunity. Seneca Nation Opp. at 6-7 n.9.

Instead of arguing that legislative history is irrelevant, the Seneca Nation asserts that the courts below "carefully considered the Act's history" and correctly determined that it did not waive the Nation's immunity from suit. Seneca Nation Opp. at 5-6. It is clear from the district and appellate court decisions that those courts did not consider legislative history pertinent to the construction of the Acts of 1875 and 1890. Cert. Pet. at 18.

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[2] In its Brief on appeal to the Court of Appeals for the Second Circuit, the Seneca Nation described the District Court's opinion herein as follows:

> The court found resort to the legislative history of that act [The Act of 1875] unnecessary in light of this conclusion [that the language did not confer a right to sue on lessees] and the well established rule that any ambiguities in federal Indian statutes should be resolved in favor of the Indians." Brief for Appellee Seneca Nation of Indians at p. 12.

Responding to lessees argument to the Second Circuit that legislative history was essential to a proper construction of the Acts of 1875 and 1890, the Seneca nation asserted:

> The Court below correctly held that resort to the 1875 Act's legislative history is not necessary since *Martinez* requires that any waiver of immunity must be unequivocally expressed in the language of the Act and cannot be implied. *Id.* at p. 36.

The decisions below are infected with reversible error because the courts refused to acknowledge that legislative history was a necessary guide to a proper construction of the Act of 1875 as amended by the Act of 1890. Cert. Pet. at 18. At a minimum, Petitioners request that this Court grant their Petition for Writ of Certiorari, vacate the decisions below, and remand to the District Court for the Western District of New York, for a full consideration of the legislative history of the Acts of 1875 and 1890.

CONCLUSION

For all of the foregoing reasons, Petitioners continue to request that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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